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# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1066

CITIZENS TO PRESERVE OVERTON PARK, INC., WILLIAM DEUPREE, SR. AND SUNSHINE K. SNYDER, PETITIONERS

*v.*

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, AND CHARLES W. SPEIGHT, COMMISSIONER, TENNESSEE DEPARTMENT OF HIGHWAYS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE SECRETARY OF TRANSPORTATION

### OPINIONS BELOW

The opinion of the district court (A. 165–174)[1] is reported at 309 F. Supp. 1189. The opinions of the court of appeals (A. 177–194) and its order denying a request for rehearing *en banc* and an application for stay (A. 195–198) are not yet reported.

### JURISDICTION

The judgment of the court of appeals (A. 198) was entered on November 17, 1970. This Court, treating an

[1] "A" references are to the joint appendix filed with this Court.

application for stay as a petition for a writ of certiorari, granted the petition on December 7, 1970 (A. 199). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether this Court should affirm the decision below that the Secretary made the necessary statutory determinations and was not required by law to make formal findings in support of his approval of the Overton Park project and should decline to consider the other issues raised here by petitioners.

2. Whether, in the alternative, this Court should remand the case to the district court to enable the Secretary of Transportation to introduce the entire administrative record upon which he based his decisions, so that the district court can review those decisions on the basis of that record.

3. Whether the district court erred in declining to order the deposition to be taken of an administrative official where the only purpose was to ascertain the basis for the administrative action taken.

4. Whether judicial review of agency action, which is not based on an administrative adjudication or on quasi-judicial administrative hearings, is limited by the Administrative Procedure Act to ascertaining whether the action taken was arbitrary, capricious, or an abuse of discretion.

## STATUTES INVOLVED

Section 4(f) of the Department of Transportation Act of 1966 (80 Stat. 934, 49 U.S.C. (Supp. III) 1653(f)) provides:

> The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge or historic site resulting from such use.

Section 4(f), as amended in 1968 (82 Stat. 824, 49 U.S.C. (Supp. V) 1653(f)), and Section 138 of the Federal-Aid Highway Act (82 Stat. 823, 23 U.S.C. (Supp. V) 138), as added in 1968, which are virtually identical, provide:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secre-

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tary shall not approve any program or project which requires the use of any publicly owned lands from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

## STATEMENT

On December 2, 1969, petitioners commenced this action in the United States District Court for the District of Columbia, contending that the Secretary of Transportation had failed to make any findings under Section 138 of the Federal-Aid Highway Act (23 U.S.C. (Supp. V) 138)—and ~~in~~ a virtually identical provision in the Department of Transportation Act (49 U.S.C. (Supp. V) 1653(f))—in approving the disbursement of federal funds to the Tennessee Department of Public Highways to build a portion of Interstate Route I–40 through Overton Park, a 342-acre public park in Memphis, Tennessee. The suit sought to enjoin the Secretary from participating financially in any construction on that portion of the highway.

On motion of the Secretary, the action was transferred to the District Court for the Western District of Tennessee (A 80–81), where Commissioner Speight of the Tennessee Highway Department was added as a

defendant. The Secretary moved on affidavits, and attachments thereto, to dismiss the suit, and the district court, treating the motion as one for summary judgment pursuant to Rule 12(c), Fed. R. Civ. P., after hearing oral argument, granted summary judgment to respondents on February 6, 1970, and denied petitioners' motion for preliminary injunction. A divided court of appeals affirmed and denied a petition for rehearing *en banc* and an application for stay. This Court granted certiorari and stayed further construction on the Overton Park project pending the issuance of its judgment.

1. Interstate I–40 is being built as a cooperative federal-state venture under the Federal-Aid Highway Act, 23 U.S.C. 101, *et seq.*, which authorizes federal grants to the states of 90 per cent of highway costs to facilitate "the prompt and early completion of the National System of Interstate and Defense Highways" (23 U.S.C. 101, 120(c)). Under the statute, the states "to the greatest extent possible" select the different routes, subject to the approval of the Secretary of Transportation (23 U.S.C. 103(d)), and submit "such surveys, plans, specifications, and estimates * * * as the Secretary may require." 23 U.S.C. 106(a). Moreover, the Act requires that a state highway department submitting plans for a route "involving the bypassing of, or going through, any city, town, or village * * * shall certify to the Secretary that it has had public hearings * * * and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban

planning as has been promulgated by the community. * * *" 23 U.S.C. (Supp. V) 128(a).[2]

In October 1966, Congress enacted the Department of Transportation Act (49 U.S.C. 1651 *et seq.*), which became effective April 1, 1967 (Ex. Order 11340, 32 Fed. Reg. 5453; 80 Stat. 931 *et seq.*). Section 4(f) of the statute provided that the Secretary of Transportation, "after the effective date of this Act," was precluded from approving "any program or project" [3] requiring the use of public parkland "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park * * *." The provision was amended slightly in 1968 (82 Stat. 824), limiting its application, insofar as here relevant, to parklands "of national, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof," and otherwise conforming it to the precise language of newly added Section 138 of the Federal-Aid Highway Act (23 U.S.C. 138, 82 Stat. 823), effective August 23, 1968 (82 Stat. 836).

2. The determination that Interstate I–40 should pass through the northern part of Overton Park was originally made by the Bureau of Public Roads in 1956 (A. 27, 39),[4] years before enactment of Section

[2] Procedural requirements for those hearings are set out in the Policy and Procedure Memorandum 20–8 of the Department of Transportation (23 C.F.R. 1, Appendix A).

[3] The term "project," as used in this context, means "an undertaking to construct a particular portion of a highway" (23 U.S.C. 101).

[4] The Bureau of Public Roads, which administers the Federal-Aid Highway Program, was then a part of the Department of

4(f) and Section 138. The decision was reaffirmed, pursuant to 23 U.S.C. 105, by the Federal Highway Administrator on January 17, 1966 (A. 33, 34, 35), again before either provision in question had been enacted. On passage of the Department of Transportation Act in October 1966, however, with its restrictions on approvals by the Secretary, for federal grant purposes, of highway programs requiring the use of public parkland unless there exists "no feasible and prudent alternative" route and the program "includes all possible planning to minimize harm" to the park, a reexamination of the Overton Park project was undertaken by the Department (A. 23–25).[5]

As part of that further study, Federal Highway Administrator Bridwell conducted a public meeting in

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Commerce. The Secretary of Commerce had delegated his authority to perform most of the functions vested in him under the Act to the Federal Highway Administrator, 25 Fed. Reg. 4162, 4166 (1960). Under the Department of Transportation Act, the Bureau of Public Roads was transferred to the new Department of Transportation (49 U.S.C. (Supp. V) 1655), and, while many functions of the Secretary of Transportation were delegated to the Federal Highway Administrator (49 C.F.R. 1.4), his responsibility under the provisions involved here was retained (49 C.F.R. 1.6).

[5] Federal Highway Administrator Bridwell, testifying at the hearings before the Subcommittee on Roads of the Senate Committee on Public Works in May 1968, made specific reference to the Overton Park project, prefacing his discussion with this statement (A. 65): "There have been plans for many years to build an interstate highway, interstate Route 40, through the park. This culminated recently in considerable controversy over whether the park could or should be used for an interstate highway. Once again this 4(f) portion of the Department of Transportation Act came into play. It, in effect, required us to do the same type of thing that we did in New Orleans, go back and look at, is there another feasible and prudent location."

Memphis on February 14, 1968, concerning the location of the route (A. 137). In addition, on April 3, 1968, he met with the Memphis City Council to discuss alternatives "on almost any conceivable line" that "engineeringly * * * was feasible" (A. 65); however, no information was given on various cost factors since they were not to enter into the Council's consideration (A. 65).[6] Essentially, attention was focused on four routes: "Mr. Bridwell used maps, aerial photographs and other graphic material to explain the effects of alignments north of the Park, south of the Park, along the north edge of the Park and the original route proposed by the Tennessee Department of Highways" (A. 24–25).[7]

After that meeting, the City Council determined, on the basis of the "considerable information and data" presented by the Federal Government and the Department of Highways of the State of Tennessee, that "the route presently designed * * * through Overton Park is the feasible and prudent location for said route" (A. 26). Two weeks later, Secretary of Transportation Boyd approved the proposed alignment through the northern part of the park (A. 36).[8] He

[6] While cost was a relevant factor for consideration by the federal government, since it would be contributing to the state 90 per cent of the highway costs, this factor was not deemed relevant to the City Council's deliberations primarily because "Memphis was not involved in the cost of the [the highway] one way or the other" (A. 65).

[7] The City Council was told (A. 65) "to concentrate upon the conflicting set of community values that were inherent in each one of the alternatives."

[8] This approval under Section 4(f) of the Department of Transportation Act, occurred on April 19, 1968, over four

then wrote a lengthy letter to the director of Citizens to Preserve Overton Park (A. 23–25), explaining the thorough examination of alternative routes and stating that "Memphis and Overton Park have received perhaps more consideration than have Baltimore and Washington," that now "the decision has been made on the specific alignment for the route," and that he had "asked Mr. Bridwell to develop a number of specific design alternatives in order to minimize damage to the park and its facilities."

Subsequent to Secretary Boyd's approval, the State Highway Department, which had been authorized on May 29, 1967 (A. 137) to purchase the right-of-way through Memphis for Interstate I–40, and had commenced doing so in the areas not immediately adjacent to the park (A. 28), acquired the remaining parcels of land in the right-of-way and proceeded to clear the last 5 miles leading to the eastern edge of Overton Park and the last 2.5 miles on the west side.[9] The State of Tennessee also entered into negotiations with the City of Memphis for the strip of parkland along the chosen route and, in September 1969, the state was deeded the 26 acres involved for $2,000,000 (A. 30).

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months before enactment of Section 138 of the Federal-Aid Highway Act. The "first ruling of the Secretary under [Section 138] of the Federal-Aid Highway Act of 1968," as pointed out in the government's brief in opposition to certiorari in *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Department, et al.* (No. 1101, this Term, certiorari denied, December 21, 1970), was not made until September 23, 1968.

[9] At the present time "ninety-nine percent of the approximately 2,200 people formerly living there have been displaced, and seventy-five percent of the buildings demolished" (A. 28).

By local ordinance, the city was required to invest this sum in other parkland; it already has spent $1,000,000 to acquire a 160-acre park, which includes a golf course, and expects to use the remainder to buy separate local park areas totalling 140 acres (A. 30, 41–42, 120–121).[10]

On November 5, 1969, after public hearings had been held by the Tennessee Highway Department (A. 30–32, 137) on the design of the highway pursuant to 23 U.S.C. 128, Secretary of Transportation Volpe announced in a press release (A. 37) that "[t]he 'hold' on the project has been lifted after the State agreed to adjust the grade line of the depressed freeway to a point as low as possible."[11] The press release further stated: "The state also has agreed to take all steps possible to minimize the harm to the park resulting from the highway" (A. 38).[12] It also pointed out (A. 37):

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[10] An additional $209,200 paid to the city by the state for construction of certain parking areas and the moving of a wooden pavilion and various utilities has been spent to improve the park's zoo (A. 120).

[11] Petitioners concede (Pet. Br. 10) that Secretary Volpe's approval went only to the design of the then determined route through the park. This action was the first taken by the Secretary of Transportation on this project after enactment of Section 138 of the Federal-Aid Highway Act.

[12] That the design of the Overton Park route was studied to determine its conformance with the statutory standard set forth in both Section 4(f) and Section 138 (see A. 137–139) is reflected most vividly in a letter dated June 5, 1969, from Assistant Secretary for Urban Systems and Environment Braman to the Executive Vice President of the National Audubon Society (see Aff. of Callison, dated January 23, 1970, Ex. F): "This is one of the several controversial road projects inherited by the Volpe Administration when it took over the De-

> The plan for Overton Park is the most reasonable now open to us and is designed to do minimum damage to the park. The options of this Administration were few, mainly because the route of the highway had previously been determined.

3. The approved segment of Interstate I–40 is to follow an existing non-access bus road (A. 130) that presently runs in an east-west direction through the northern part of Overton Park and is, including the paved area and the right-of-way on either side, approximately 40–50 feet wide (A. 130).[13] Immediately north of this bus road, starting at the western edge of the park and continuing eastward for about two-thirds the distance of the road, there is now a chain-link fence (A. 116), which separates the zoo from the rest of the park.[14] The remaining area north of the

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partment. We are at the present time energetically exploring all possibilities open to this office to assure the best possible design that is in keeping with the requirements laid upon the Secretary by Section 4(f) of the Transportation Act."

[13] As the highway enters the park from the east, it will be approximately 425 feet wide due to the proximity of an auxiliary access ramp not in the park area; it will then taper abruptly to a width of approximately 250 feet and remain at that width until it leaves the park (A. 58). Present plans call for a 40-foot median strip, both for safety and aesthetic purposes, to run the entire length of the park (A. 29–30, 41).

[14] At the present time, the city, primarily with a portion of the funds received from the state in the purchase of 26 acres in Overton Park, is expanding zoo facilities in an easterly direction, in an area of the park still remaining north of the existing bus road (A. 114). Except for a portion of one parking lot, the entire zoo area will be untouched by construction of Interstate I–40 (A. 29, 115, 120, 133).

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road is composed primarily of zoo parking lots which the city expects to improve and expand.[15]

Overton Park, then, is essentially to the south of the existing bus road. This is where the nine-hole municipal golf course is located, and the outdoor theatre, the art academy, the lake, the nature trails, the bridle path, and the picnic grounds (A. 115–116, 120). This entire area will remain virtually untouched (A. 29, 116, 120).[16]

Construction of the highway will involve taking 26 acres—or less than 8 percent—of the 342 acres of parkland (A. 29, 117). While it will necessitate cutting down some 12 acres of trees, approximately 150 acres of unimproved wooded area will not be affected (A. 112).

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[15] The expansion program for zoo facilities being undertaken by the city (A. 114, 121) is a clear indication that more than the estimated 1½ million people who visited the zoo in 1967 (A. 15) are expected after the highway is completed.

[16] There is thus little basis for petitioners' bald assertion (Pet. Br. 7) that no consideration was given to the millions of people who use Overton Park annually. Similarly, the contention (Pet. Br. 7) that "the present route will displace or affect more people than the alternative to the north of the park and nearly as many as that to the south" is without merit. The north route, while displacing less residents (though destroying more residential units), would require (A. 69, 145) destruction of almost 100 more commercial and industrial units, an additional church, and 3 more schools, including Southwestern University and the largest high school in Memphis (no estimate of "people affected" by the taking of these schools is reflected in the statistics on which petitioners (pp. 7–8, n. 5) rely). The alternative route south of the park (A. 69, 145) would require displacing approximately 800 more residents (destroying over 350 more residential units), leveling 16 additional commercial and industrial units, taking two more schools and a hospital and home for the aged.

The new roadway is to be depressed below ground level so that the traffic on the road will not be visible to users of the park (A. 30, 40–41, 138–139);[17] in one area, however, where the highway crosses a creek, it will not be depressed, since to do so would cause serious drainage problems (A. 123–125).[18]

## SUMMARY OF ARGUMENT

### I

In this case, petitioners challenge the approval by the Secretary of Transportation of the route location and route design of the Overton Park segment of Interstate I–40 on the ground that the Secretary did not make any formal findings in the language of Section 4(f) of the Department of Transportation Act and the identical wording found in Section 138 of the Federal-Aid Highway Act. Those provisions vest in the Secretary the ultimate authority to determine whether there exist any "feasible and prudent alternative to the use" of parkland for highway construction and, if not, whether the proposed highway

[17] Both a bore tunnel and a cut-and-cover tunnel were considered (A. 28, 40) and rejected. The cost of the former would have been about $107,000,000; the cost of the latter would have been $41,500,000 (A. 28, 40). This compares with the $3,500,000 figure for the depressed route. Moreover, both alternatives presented difficult problems of construction, drainage, concentrated air pollution at ventilation points, and traffic safety (A. 28, 40). Further, the bore tunnel would have had to be at least 20 feet deep to avoid tap roots, and even then there was a serious risk that the trees would not survive (A. 40). The cut-and-cover tunnel would have destroyed the park vegetation to the same extent as the depressed highway (A. 40).

[18] A proposal to depress the highway in this area by using a syphon pump was fully studied, and rejected (A. 124–125).

project "includes all possible planning to minimize harm to such park." However, neither the Department of Transportation Act nor the Federal-Aid Highway Act contains a formal requirement that the Secretary issue written findings in support of his determinations under the statutory standard. Moreover, the provisions of the Administrative Procedure Act that require written findings in support of action taken by an administrative agency have no application to the instant case. Since it is clear on the record before this Court that each Secretary did in fact make the proper determinations under the statute, the decision below should be affirmed and this Court should decline to consider whether the approvals were arbitrary, capricious or an abuse of discretion; that issue was never raised by the pleadings.

## II

However, if this Court is of the view that the question going to the merits of the Secretary's determinations has been properly raised by petitioners, the proper disposition of this case is to remand it to the district court to enable the Secretary of Transportation to introduce the entire administrative record upon which his decisions, and those of his predecessor, were based, and thus permit the district court to decide on the summary judgment motion whether the action taken was arbitrary and capricious on the basis of a review of that record. While, in our view, the affidavits, and attachments thereto, fully support the decision below on this issue, we recognize that such documentation may be characterized as just the sort of

"counsel's *post hoc* rationalizations" on which this Court has expressed a particular reluctance to rely. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168–169. By providing the district court this opportunity to subject the entire administrative record to judicial scrutiny, "[t]he administrative process will best be vindicated" and the likelihood of propelling "the courts into the domain which Congress has set aside exclusively for the administrative agency" best avoided. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 197.

## III

The courts below committed no error in refusing to permit petitioners to take the deposition of past Federal Highway Administrator Bridwell, a man not vested with the ultimate responsibility to make the statutory determinations prescribed in Section 4(f) and Section 138 and thus in no position to testify whether in fact such determinations had been made. Manifestly, the purpose for noticing Bridwell's deposition was, as petitioners originally indicated, to "ascertain the basis, if any, for the Secretary's approval." This Court has long recognized that interrogation of administrative officials, including the Secretary himself, in order to "probe the mental processes" is impermissible. *United States* v. *Morgan,* 313 U.S. 409, 422. That principle has particular application to the present case where the indication on the record before this Court that the Secretary in fact made the requisite statutory determinations is no less clear than it was in *Morgan.* Significantly, there is no claim here

of bad faith or undue political pressure which might warrant pre-trial interrogation of an administrative official concerning some specific personal charge against him.

## IV

There remains only the question of what reviewing standard should be applied by the courts in examining action by the Secretary of Transportation under Section 4(f) and Section 138. Petitioners argue here, for the first time, that such administrative decisions can be upheld only if supported by substantial evidence. However, the "substantial evidence" standard is, by the express terms of the Administrative Procedure Act, as revised (5 U.S.C. (Supp. V) 706(2)(E)), to be used only in cases where the court is reviewing action by an agency taken pursuant to the rule-making provisions of the Act, or agency action based on an adjudicatory hearing as required by sections 556 and 557 of the Act, or an agency determination subject to review "on the record of an agency hearing provided by statute." The instant case comes within none of the enumerated categories. Accordingly, the proper reviewing standard is the one applied by both courts below and consistently followed by other courts in litigation of this type. The judicial task is to ascertain from the administrative record only whether the decision to route Interstate I–40 through Overton Park as a depressed highway was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. (Supp. V) 706(2)(A)).

## ARGUMENT

### I

### THIS COURT SHOULD AFFIRM THE DECISION BELOW THAT THE SECRETARY MADE THE NECESSARY STATUTORY DETERMINATIONS AND WAS NOT REQUIRED TO MAKE FORMAL FINDINGS IN SUPPORT OF HIS APPROVAL OF THE OVERTON PARK PROJECT, AND SHOULD DECLINE TO CONSIDER THE OTHER ISSUES RAISED HERE BY PETITIONERS

Petitioners commenced this action in the United States District Court for the District of Columbia (see pp. 4–5 *supra*), charging, insofar as here relevant,[19] only that (A. 11–12, 89–90):

> Neither Defendant Volpe nor any previous Secretary of Transportation has made any finding that there is no feasible and prudent alternative to the use of [Overton Park]. Defendant Volpe has made no finding that the program for the Project includes all possible planning to minimize harm to such park and recreation areas. In the absence of such findings, his approval of the Project has violated 23 U.S.C. § 138 and 49 U.S.C. § 1653(f).

The statutory provisions in question preclude the Secretary of Transportation from approving, for federal grant purposes, any highway "program or project" (*supra* n. 3) requiring the use of public parkland of national, state or local significance "unless (1) there is no feasible and prudent alternative to the use of such land and (2) such program includes all possi-

[19] Petitioners also alleged procedural errors in the public hearings held by the Tennessee Highway Department pursuant to 23 U.S.C. 128. Both courts below rejected this argument (A. 167–170, 187–188), and petitioners have not raised it again here.

ble planning to minimize harm to such park." 23 U.S.C. 138; 49 U.S.C. 1653(f). The responsibility for applying this standard rests, in the final analysis, solely with the Secretary, though he is instructed, in reaching his decision, too "cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States * * *" (*ibid.*).

1. A review of the legislative history of both Section 4(f) and Section 138 reflects that, while Congress intended the Secretary to give full and complete consideration to any conceivable alternative route under the statutory standard, it also meant for him to have a wide latitude of discretion in his application of that standard. When the proposal was made in the House in 1968 to add to the Federal-Aid Highway Act a provision similar to Section 4(f) of the Department of Transportation Act of 1966,[20] it was recommended that the statutory language in the new provision be changed after the word "unless" to read: "such program or project includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park * * *" H.R. No. 17134, § 17, 90th Cong., 2d Sess. (1968), 114 Cong. Rec. 19393. The amendment passed the House,[21] despite

[20] There was very little discussion of this provision in either house in 1966. See 112 Cong. Rec. 14073, 26565; S. Rep. No. 1659, 89th Cong., 2d Sess. 5–6 (1966). It is noteworthy, however, that Section 4(f) of the original Senate bill, which ultimately became the law, was amended in conference to add the words "and prudent" after the word "feasible." H. Conf. Rep. No. 2236, 89th Cong. 2d. Sess. 25 (1966).

[21] The House amendment also amended Section 4(f) of the Department of Transportation Act of 1966 to make that pro-

strong criticism that the standard it set forth was too vague (114 Cong. Rec. 19409):

> What does "consideration of alternatives" mean? How much consideration to what kinds of alternatives? The amendment might permit a highway engineer to glance at an alternative to a proposed highway—an alternative that is more costly but does not slice through a park—and reject the alternative because use of the parkland will keep down his acquisition costs. Section 17 is totally inconsistent with the intent of Congress to preserve and enhance this Nation's countryside by providing an explicit standard to guide the Secretary of Transportation's decision. It should, therefore, be rejected. [Rep. McCarthy]

However, the view expressed above prevailed in the Senate (114 Cong. Rec. 19529–19530; Sen. Jackson), and that body reported out a bill (S. 3418) which tracked the "no feasible and prudent alternative" language in Section 4(f) of the 1966 Act. 114 Cong. Rec. 19531. This bill was the one adopted by the Conference Committee (H. Conf. Rep. No. 1779, 90th Cong., 2d Sess. 32) and eventually enacted into law. 23 U.S.C. 138; 49 U.S.C. (Supp V) 1653(f).

It is in this light that the colloquy among Senators Cooper, Randolph, and Jackson, on which petitioners place such heavy reliance (Pet. Br. pp. 7a–9a), must be read. Manifestly, Congress intended the Secretary to have "no discretion" (114 Cong. Rec. 24033; Sen. Cooper) concerning *whether* full and complete con-

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vision conform with the proposed language for Section 138. H.R. 17134, § 18, 90th Cong., 2d Sess. (1968).

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sideration need be given to all alternatives. Cf. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 612. On this point, as Senator Randolph observes (114 Cong. Rec. 24033), the "interpretation of the House" did not prevail. Rather, the language enacted provided a clear and firm barrier. In the words of Senator Cooper (114 Cong. Rec. 24033), it "prohibits any intrusion upon or invasion of these [park] lands or areas if one of these bodies finds it is of National, State, or local significance, and the highway cannot be built, unless there is no feasible and prudent alternative to doing so." Thus, in most precise terms, Congress provided "an explicit standard to guide the Secretary of Transportation's decisions" (114 Cong. Rec. 19409; Rep. McCarthy), vesting in him "the authority * * * to protect these irreplaceable lands and sites from the cynical intrusions of the insensitive highway lobby" (114 Cong. Rec. 24036-24037; Sen. Yarborough). Indeed, under the statute, "even though local authorities * * * should decide the highway would not violate the recreational area or the public park area, the Secretary would nevertheless retain the right to veto the action" (114 Cong. Rec. 20433; Senator Jackson).

In exercising his statutory responsibility, the Secretary has the delicate task of balancing, on the one hand, the overall detriment to the community by use of the parkland—weighing such factors as the extent to which the community uses the area as parkland, the actual damage to the park, the availability of other parkland in the community, and other factors—and, on the other hand, the harsh impact on people due to dislocation and displacement if the parkland is not

used. As stated in the report of the Senate Public Works Committee, in approving the bill that became the present law (S. Rep. No. 1340, 90th Cong., 2d Sess. 19), and reiterated on the floor of the Senate by the committee chairman (114 Cong. Rec. 19530; Sen. Randolph):

> The committee would further emphasize that while the areas sought to be protected by section 4(f) of the Department of Transportation Act and section 138 of title 23 are important, there are other high priority items which must also be weighed in the balance. The committee is extremely concerned that the highway program be carried out in such a manner as to reduce in all instances the harsh impact on people which results from the dislocation and displacement by reason of highway construction. Therefore, the use of park lands properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movements of large numbers of people.

On this point, the House was in full agreement; in the report of the House Committee on Public Works (H. Rep. No. 1584, 90th Cong., 2d Sess. 12), there appears the following clear statement of intent:

> Parklands and historic sites, as well as the other kinds of areas listed in these sections, have very real value; if that were not so, neither section of law would exist. No rational person would suggest, however, that that value is the only one to be considered in a judgment as to the best public interest. In weighing alternatives for highway location, equal consideration must be given to other factors—to whether

> people will be displaced; to whether existing communities will be disrupted; to whether the established demand for adequate transportation facilities for people, goods, and services will be met; and to the preferences of the people of the area involved. Preservation for use is sound conservation philosophy, and it is in that perspective that both section 138 and section 4(f) should be administered.

There is no better evidence of the complete unanimity of both houses on this point than the report of the Conference Committee which reported out the compromise bill that was ultimately enacted. There, it was stated that (H. Conf. Rep. No. 1799, 90th Cong., 2d Sess. 32):

> This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority.

2. In the instant case, the record presently before this Court reflects that the Secretary of Transportation, both at the time Secretary Boyd approved the route location in April 1968, and at the time Secretary Volpe approved the route design in November 1969,

made the determinations required of him under Section 4(f) and Section 138.

After enactment of Section 4(f) in 1966, Secretary Boyd, though perhaps technically not required to do so (see *Triangle Improvement Council* v. *Ritchie,* 314 F. Supp. 20 (S.D.W.Va.), affirmed, 429 F. 2d 423, (C.A. 4), certiorari granted, December 21, 1970 (No. 712, this Term)), re-examined the Overton Park project to determine whether there existed any feasible and prudent alternatives (n. 5, *supra*). He sent Federal Highway Administrator Bridwell to Memphis to discuss the route location with the Memphis City Council. After that discussion, the City Council, without regard to cost factors (*supra,* p. 8), approved the designated route through the park as the "feasible and prudent" location for the highway. Only then did Secretary Boyd approve the route, in an announcement stating that "the action follows an April 5 resolution by the Memphis City Council which found the park route 'feasible and prudent' " (A. 36).

The suggestion by petitioners that the Secretary was unaware of the statutory standard at the time he acted is refuted not only by the testimony of Federal Highway Administrator Bridwell before the Senate Subcommittee on Roads (n. 5, *supra*) and by the language of the April 19, 1968 press release (A. 36), but also by two letters the Secretary wrote shortly thereafter, the first to the Director of Citizens to Preserve Overton Park, explaining the careful consideration given to alternate routes (A. 23–25), and the sec-

ond to Speaker of the House McCormack, quoting the statute verbatim and opposing any amendment to the language of Section 4(f).[22] 114 Cong. Rec. 19530. It is equally clear that Secretary Volpe, at the time he approved the design of the highway (see n. 11, *supra*), was cognizant of the statutory standard. Indeed, his approval was conditioned explicitly on an agreement by the state "to take all steps possible to minimize the harm to the park resulting from the highway" (A. 38).

3. Petitioners contend, however, that the Secretaries' approvals were unlawful because unsupported by formal findings in the language of the statute. However, there is no requirement for such findings in the Department of Transportation Act; nor did Congress include such a provision in the Federal-Aid Highway Act.[23] Moreover, the Administrative Procedure Act (formerly 5 U.S.C. 1001 *et seq.*), expressly excludes grants-in-aid from its rule-making provision (5 U.S.C.

[22] In that letter, Secretary Boyd stated: "The Department is aware of no problems which have arisen in the course of administering the present language * * *."

[23] A separate provision of this Act (23 U.S.C. 109) precludes the Secretary from approving "plans and specifications for proposed projects on any Federal-aid system" unless there is provision for a facility "(1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conductive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality." This provision has consistently been interpreted by the Department as not requiring formal written findings in support of the Secretary's approval.

(Supp. V) 553(a)(2)),[24] and requires written findings and conclusions only in "case[s] of adjudication required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. 554(a)). The Secretary's determination of the proper route and design for a highway cannot reasonably be considered such an "adjudication." See *Gart* v. *Cole*, 263 F. 2d 244 (C.A. 2); *South Suburban Safeway Lines* v. *City of Chicago*, 416 F. 2d 535 (C.A. 7). Nor can the applicable statutes be construed as instructing the Secretary to hold an "agency hearing" before approving an interstate route. Cf. *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F. 2d 624, 627–631 (C.A.D.C.), certiorari denied, 385 U.S. 843; *Borden Company* v. *Freeman, et al.*, 256 F. Supp. 592, 600–602 (D.N.J.). Rather, public hearings of a non-adjudicatory, quasi-legislative nature are to be conducted by state officials (23 U.S.C. 128), and the transcripts forwarded to the Secretary for his consideration, along with Department studies (A. 39–42, 143–148), reports by independent firms (A. 101–111) and all other documents and exhibits that together comprise the administrative record (see n. 31, *infra*).[25]

[24] By the terms of this section, the rule-making provision has no application where there is involved "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." This case involves both "public property" and "grants" within the meaning of the above language.

[25] The legislative history indicates that the Secretary is not to limit his consideration to information received from state and local sources, but is to go beyond this information and reach his own independent decision on the basis of the entire record before him. 114 Cong. Rec. 24036–24037.

This Court has traditionally demonstrated a marked reluctance to insist on formal findings where none are legislatively commanded. *United States* v. *Louisiana*, 290 U.S. 70, 80; *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 186; *Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, 69; *United States* v. *Rock Royal Co-op*, 307 U.S. 533, 567–568; *American Trucking Association* v. *United States*, 344 U.S. 298, 320; but see *City of Yonkers* v. *United States*, 320 U.S. 685.[26] Indeed, when it has required findings, the reason generally given is that the case, as it came before the Court, rested on conflicting inferences of fact unresolved by the administrative record. See, *e.g.*, *Baltimore & Ohio R.R. Co.* v. *Aberdeen & R.R. Co.*, 393 U.S. 87, 92; *Florida* v. *United States*, 282 U.S. 194, 214–215; *United States* v. *Baltimore & Ohio R.R. Co.*, 293 U.S. 454, 463–464; *City of Yonkers* v. *United States*, 320 U.S. 685, 695 (Frankfurter, J., dissenting). That rationale has no application to the instant case where, on the question whether the Secretary in fact made the statutory determinations, there exist no conflicting inferences of fact.

Moreover, even if a contrary inference could be drawn from the present record before this Court, those decisions indicate (consistent with our position if this Court should feel constrained to reach the

[26] The *City of Yonkers* case involved a failure of the Interstate Commerce Commission to include in its order an explicit finding of jurisdiction, even though no party had raised a question of jurisdiction in proceedings before the Commission. Since agency findings of "jurisdictional facts" are subject to special requirements that do not apply to agency findings of other facts, the *Yonkers* decision represents nothing more than an exception to the general rule enunciated in the other cases. See generally, Davis *Administrative Law* § 164 (1951).

other issues urged here by petitioners; see pp. 30–35, *infra*) that this action should be remanded to the district court to permit the Secretary to introduce the entire administrative record on which his decisions were based. For the Court now to require formal findings where none are called for by statute, without first subjecting the administrative record to judicial scrutiny, would, in our view, be inappropriate.

In so stating, we are not unmindful of the new regulation issued by the Department of Transportation on October 7, 1970 (DOT Order 5610.1), which requires the Secretary to make formal findings in the language of the statute in support of all approvals under Section 4(f) of the Department of Transportation Act. While that regulation will guarantee a comprehensive statement of reasons in future cases, it was not intended to have retrospective application.[27] Even if it must be considered, under the authority of *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 281–282, as the law in effect at the time this Court hands down its decision, there are compelling reasons that it not be held to apply here.[28]

Secretary Boyd's approval of the route location in April 1968 [29] marked the beginning of serious negotiations between the State of Tennessee and the City of

[27] The regulation was promulgated pursuant to Ex. Order 11514, dated March 5, 1970, which instructs all Federal agencies to initiate procedures needed to direct their policies and programs so as to meet national environmental goals.

[28] This Court acknowledged in *Thorpe* that it did not there intend to lay down an absolute rule (393 U.S. at 282).

[29] Petitioners chose not to commence this litigation until December 2, 1969 (see n. 33, *infra*).

Memphis for the purchase of the 26 acre strip of parkland to be used for Interstate I–40. This land was acquired in September 1969, for $2,000,000 (*supra,* p. 9), a portion of which has already been invested by the city in additional parkland (*supra,* p. 10). Similarly, the state, subsequent to Secretary Boyd's approval, proceeded to acquire and clear the remaining land in the right-of-way up to either edge of the park; some 2,200 persons have now been moved out of this area and their homes have been destroyed (*supra,* p. 9). Thus, unlike the *Thorpe* case where there had been no change of circumstances (393 U.S. 283), the situation confronting the Department at the time it studied the Overton Park project in 1967–68 has changed drastically.

Moreover, there has been no suggestion by petitioners in this case that either Secretary Boyd or Secretary Volpe acted in bad faith, or as a result of political pressure, or because of some other improper or illegal reason prejudicial to petitioners (*infra,* pp. 37–38). We do not, then, have here an analogue to *Thorpe,* where the evidence indicated that the tenant's eviction was for reasons that were not only improper, but indeed unconstitutional (393 U.S. 282–283). Instead, the evidence before this Court all points to but one conclusion (*supra,* pp. 23–24): that each Secretary approved the Overton Park project because he had determined in accordance with the requisite statutory standard that there existed "no feasible and prudent alternatives to the use of such land" and that the project included "all possible planning to minimize harm" to the park.

Plainly, then, this case does not present a situation to which *Thorpe* applies (393 U.S. at 283). There is not here any evidence of a substantive violation of the new regulation—*i.e.,* a failure of the Secretary to make the findings required by the statutes—but merely evidence of a failure to adhere to certain formalities the Department will henceforth follow. In these circumstances, insistence on such formalism would, in the words of Mr. Justice Frankfurter, be tantamount to "marching the king's men up the hill and then marching them down again." *City of Yonkers* v. *United States,* 320 U.S. 685, 694 (dissenting opinion).

Thus, even if it should be held, for some reason, that the new regulation applies here, the failure to have made formal findings would not be prejudicial on the facts of this case (see 5 U.S.C. 706). This Court has traditionally expressed concern that agency action not be reversed "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached." *Massachusetts Trustees of Eastern Gas & Fuel Associates* v. *United States,* 377 U.S. 235, 248. In our view, that principle should control here, and the judgments below should be affirmed.

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Since the other major issue now before this Court—whether the action taken by the Secretary of Transportation on the Overton Park project was arbitrary, capricious, or an abuse of discretion—was never raised in the pleadings (*supra,* p. 17), it would be appropriate for the Court to dispose of the case on the

"findings" issue alone, without reaching the other question. If, however, the Court should conclude that this other question is in the case,[30] it is our view, as reflected in our motion to remand filed on December 21, 1970, that the case should be returned to the district court to enable the Secretary to introduce the entire administrative record on which his decisions were based,[31] and to afford the district court an opportunity to decide, on summary judgment motion, whether either Secretary's action was arbitrary and capricious (see *infra*, pp. 39–42). We now discuss the latter alternative.

## II

### IN THE ALTERNATIVE, THIS COURT SHOULD REMAND THE CASE TO THE DISTRICT COURT TO ENABLE THE SECRETARY OF TRANSPORTATION TO INTRODUCE THE ENTIRE ADMINISTRATIVE RECORD UPON WHICH HE BASED HIS DECISIONS, SO THAT THE DISTRICT COURT CAN REVIEW THOSE DECISIONS ON THE BASIS OF THAT RECORD

It has been generally recognized, following this Court's first decision in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87, that, when

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[30] The issue was raised and considered during oral argument before the district court (see p. 39, *infra*). See Rule 15(b), Fed.R. Civ. P.

[31] There is no disagreement here as to what constitutes the "administrative record." It is, as petitioners point out (Pet. Br. 30), all "information which the Secretary had before him when he made the decisions under review." As observed in *Road Review League, Town of Bedford* v. *Boyd*, 270 F. Supp. 650, 662 (S.D.N.Y.), a case strikingly similar to the present action, "[i]t is on that record that the Administrator acted and on

reviewable by the courts,[32] "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." This does not mean "appellate counsel's *post hoc* rationalizations for [the] agency action," *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168–169; rather, as this Court ruled in the second *Chenery* case (332 U.S. 194, 196), a "reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." It must, under the Administrative Procedure Act (5 U.S.C. 706), reach its decision on the basis of the "whole record" compiled by the agency, or such portions thereof as may be cited by any party (see pp. 41–42 *infra*).

In the instant case, the courts below determined, without recourse to the administrative record on which the action was founded, that the approval by the Secretary of Transportation of the route and design of the Overton Park project was neither arbitrary, capricious, nor an abuse of discretion. It is our position that that determination is correct and is fully sup-

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that record that his action must be judged." And see *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433, 437 (N.D. Calif.). The Department of Transportation has advised us that the "administrative record" on the Overton Park project consists of one carton (approximately file-drawer size) of documents, all of which have heretofore been examined by counsel for petitioners.

[32] Action by the Secretary of Transportation under the provisions here in question is subject to judicial review in accordance with the Administrative Procedure Act. See 49 U.S.C. 1655(h).

ported by the affidavits, and attachments thereto, introduced on the government's motion for summary judgment.[33]

We recognize, however, that the supporting documentation might be characterized as the sort of "counsel's *post hoc* rationalizations" on which this Court has consistently expressed a reluctance to rely. See,

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[33] In opposing the application for stay and the petition for a writ of certiorari, it was our position that the issues presented were not of sufficient importance to warrant a grant of certiorari (Gov't Mem. in Opp., No. 1066, this Term). The sworn affidavits before the Court reflect the careful consideration given to "feasible and prudent alternatives" and to "all possible planning to minimize harm" to Overton Park. Moreover, they demonstrate that both Secretary Boyd and Secretary Volpe were fully aware of the statutory standard at the time they gave their approvals and that they acted in accordance with that standard (*supra*, pp. 23–24). Finally, they show that petitioners, though apprised of the fact that Interstate I–40 was to pass through the northern part of Overton Park as early as June 1968 (A. 23–25), waited until December 1969 to commence this suit, after the state had purchased the parkland to be affected and had acquired and cleared the right-of-way to the edge of the park on either side. Petitioners presented no factual evidence to support their bald assertion that the Secretary of Transportation acted improperly; they have not yet suggested a single route which can be shown to be a "feasible and prudent" alternative (A. 109–111); they give no factual basis for their claim that the approved design does not "include all possible planning to minimize harm" to the park. In these circumstances, there seemed no occasion for this Court to review a possible procedural error by the trial court, for the stated purpose, not to prevent construction of the highway through Overton Park, but to gain a remand and further delay of that construction. However, since at least four members of the Court did not agree, we think it important that a review of the merits be on the basis of the entire administrative record in order to avoid further delay and needless additional litigation of this action.

*e.g., National Labor Relations Board* v. *Metropolitan Life Insurance Company,* 380 U.S. 438, 444; *Burlington Truck Lines* v. *United States, supra.* Accordingly, if this Court considers that question now to be properly before it, the proper disposition of this case is a remand to the district court for introduction of the administrative record (*supra* n. 31), thus giving the Secretary an opportunity "to disclose the basis" of his approval and "give clear indication that [he] has exercised the discretion with which Congress has empowered [him]." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 197; *National Labor Relations Board* v. *Metropolitan Life Insurance Company,* 380 U.S. 438, 442–443. In this way, "[t]he administrative process will best be vindicated" and the likelihood of propelling "the court[s] into the domain which Congress has set aside exclusively for the administrative agency" best avoided. *Phelps Dodge Corp.* v. *National Labor Relations Board, supra; Burlington Truck Lines* v. *United States,* 371 U.S. 156, 169; *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 196.

This is not, as petitioners contend, a case for remand to the agency. Without first reviewing the administrative record, there is no basis for a court to conclude that the Secretary acted improperly; indeed, the law generally presumes otherwise (see, *e.g., United States* v. *Chemical Foundation,* 272 U.S. 1, 14–15; *Pacific States Box & Basket Co.* v. *White,* 296 U.S. 176, 185; *Goldberg* v. *Truck Drivers Local Union No. 299,* 293 F. 2d 807, 812 (C.A. 6), certiorari denied, 368 U.S. 938; *Braniff Airways, Inc.* v. *Civil Aeronau-*

*tics Board,* 379 F. 2d 453 (C.A.D.C.)), and there is nothing before this Court to contradict that presumption. As we have already pointed out (*supra,* pp. 24–27), the fact that there are no written findings in the language of the statute, is not, by itself, a reason for returning the case to the Secretary without first examining the administrative record to ascertain if such findings are needed in the circumstances of this case (see pp. 28–29, *supra*). Insistence on such formalism would burden needlessly the administrative process with ritualistic requirements that may be unnecessary. See, *e.g., City of Yonkers* v. *United States,* 320 U.S. 685, 697–698 (Frankfurter, J., dissenting); *Twin City Milk Producers Ass'n* v. *McNutt,* 123 F. 2d 396 (C.A. 8), following remand from 122 F. 2d 564.

It is, therefore, our submission that, if this Court considers the issue whether the Secretary acted arbitrarily to be in the case, the motion to remand should be grant to permit the district court to hear and determine that issue on the summary judgment motion on the basis of the administrative record. The challenge here to the Secretary's action is not entitled to a *de novo* hearing. See *e.g., Berman* v. *Parker,* 348 U.S. 26, 35; *Nashville I–40 Steering Committee* v. *Ellington,* 387 F. 2d 179, 185 (C.A. 6), certiorari denied, 390 U.S. 921; *Dredge Corp.* v. *Penny,* 338 F. 2d 456, 462 (C.A. 9). The judicial task is merely to determine whether the administrator's decision was arbitrary or capricious (see pp. 39–42, *infra*) on the evidence he had before him at the time it was made.

See *Road Review League, Town of Bedford* v. *Boyd*, 270 F. Supp. 650, 662 (S.D.N.Y.); *Couch* v. *Udall*, 265 F. Supp. 848 (W.D. Okla.); 5 U.S.C. 706. That presents only an issue of law, *Dredge Corp.* v. *Penny*, *supra*, and thus can appropriately be disposed of by summary judgment. Cf. *Adams* v. *United States*, 318 F. 2d 861 (C.A. 9).

## III

### THE DISTRICT COURT DID NOT ERR IN DECLINING TO ORDER THE DEPOSITION OF AN ADMINISTRATIVE OFFICIAL WHERE THE ONLY PURPOSE WAS TO ASCERTAIN THE BASIS FOR HIS ACTION

Petitioners ascribe as error the refusal of both courts below to permit them to compel an administrative official to testify before trial concerning the action taken by the Secretary of Transportation.

Shortly after they commenced this litigation, petitioners noticed the deposition of Federal Highway Administrator Bridwell (A. 73); respondents moved immediately for a protective order, which was granted on January 16, 1970 (A. 74). Petitioners now assert (Pet. Br. 24) that interrogation of Bridwell was sought "to ascertain whether in fact" the Secretary had made any determinations under Section 4(f) and Section 138. However, that question can be answered only by the Secretary, who alone is vested with the responsibility to make such determinations. While the Federal Highway Administrator might be in a position

to offer his personal opinion on the subject, it is doubtful he can do much more.[34] Manifestly, then, the purpose for noticing Bridwell's deposition was, as originally indicated by petitioners, "to ascertain the basis, if any, for [the Secretary's] determinations"[35] (Application for Stay, p. 6).

That this is impermissible, even when it involves the Secretary himself, has long been recognized by this Court. In *United States* v. *Morgan,* 313 U.S. 409, where the Secretary of Agriculture had been "questioned at length regarding the process by which he reached the conclusions of his order [under the Packers and Stockyards Act, 7 U.S.C. 181 *et seq.*] * * *," this Court held (313 U.S. at 422):

> * * * [T]he short of the business is that the Secretary should never have been subjected to this examination. * * * We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny * * *, so the integrity of the administrative process must be equally respected. * * *

[34] Bridwell, who left office along with Secretary Boyd, can shed little, or no, light on the decision by Secretary Volpe.

[35] It is our position that the basis for the Secretaries' decisions can best be ascertained from the administrative record. Indeed, it is on that record, and that record alone, that courts must determine whether administrative action was arbitrary or capricious or, in the alternative, unsupported by substantial evidence (*supra*, n. 31). See 5 U.S.C (Supp. V) 706; and see, *e.g.*, *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488; *Consolidated Edison Co. et al.* v. *National Labor Relations Board*, 305 U.S. 197, 229.

Petitioners seek to distinguish *Morgan* on the ground that the Secretary in that case issued formal findings, whereas here he did not. As we have already demonstrated (*supra*, pp. 23–24), however, the indication on this record that the Secretary in each instance in fact made the requisite statutory determinations is no less clear than it was in *Morgan*. This is not, then, a case like *D.C. Federation of Civic Associations* v. *Volpe*, 316 F. Supp. 754 (D. D.C.), relied on heavily by petitioners, where the district court was unable to find any reference to the language of Section 138 in the Secretary's press release (316 F. Supp. at 770 n. 31).[36] Plainly, here the purpose was the prohibited one of probing the mental processes of the administrative officials. *Braniff Airways, Inc.* v. *Civil Aeronautics Board*, 379 F. 2d 453, 460–461 (C.A.D.C.); *D.C. Federation of Civic Associations, Inc.* v. *Sirica*, C.A. D.C., No. 24,216, decided May 8, 1970.

Petitioners cite *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, and its progeny (Pet. Br. pp. 25–26), as authority for permitting them to take Bridwell's deposition. These cases, however, to the extent they are apposite, support the contrary conclusion. For, in each the administrative officials were ac-

[36] In addition, in *D.C. Federation* there was no administrative record available for introduction in the courts (316 F. Supp. at 773, n. 36); accordingly, the testimony at trial of the Secretary was essential to judicial review of the agency action. Here, however, there is available for introduction in the district court an extensive administrative record on which the court can ascertain the basis for the determinations made. See, *e.g.*, *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Department, et al.*, No. 1101, this Term, certiorari denied, December 21, 1970.

cused of acting in bad faith or as a result of political pressure, and some evidence had been introduced to substantiate the claim.[37] See, *e.g., Singer Sewing Machine Co.* v. *National Labor Relations Board,* 329 F. 2d 200 (C.A. 4); *Road Review League, Town of Bedford* v. *Boyd,* 270 F. Supp. 650 (S.D.N.Y.); *Triangle Improvement Council* v. *Ritchie, supra; D.C. Federation of Civic Associations* v. *Volpe, supra.* Thus, they were subjected to interrogation to answer the specific personal charges against them. In the instant case, no such claim has been made; nor has any evidence been introduced to suggest, even inferentially, such a possibility.[38]

[37] In *United States ex rel Accardi* v. *Shaughnessy,* 347 U.S. 260 (*Accardi I*), an alien, who was ordered to be deported, claimed his application for suspension of deportation had been denied by the Board of Immigration for improper reasons: a prejudicial circulation by the Attorney General of a confidential list of "unsavory characters" which included his name. Thus, the alien on remand was permitted to call the Board members to testify with respect to the basis for their decision; in *Accardi II* (349 U.S. 280) their testimony was relied on to dispose of the case against Accardi.

[38] While the *amicus* brief of the Committee of 100 on the Federal City, Inc., attempts for the first time to interject such a claim into the instant proceedings, the effort is wholly unfounded. Here, petitioners' counsel had full access to the entire administrative record that was before the Secretary at the time the route and design were approved; yet he was unable, on examination of all the materials, to introduce any evidence contradicting the Swick Affidavit (A. 61–62). Nor was he able to claim that either Secretary reached his decision for improper reasons, or in bad faith. As to *amicus*' vague references to the Holmes memorandum (pp. 8–10), the "something similar" said to be involved in this case remains as much a mystery to the Department of Transportation as it apparently was to Mr. Wells at the time he testified. In short, petitioners' pre-trial

## IV

THE STANDARD FOR JUDICIAL REVIEW IN THIS CASE IS WHETHER THE SECRETARY'S APPROVAL OF THE ROUTE AND DESIGN WAS "ARBITARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW"

There remains only the question, raised here for the first time, of what reviewing standard the district court should apply, in the event this case is remanded, in examining action by the Secretary of Transportation under Section 4(f) and Section 138.[39] Petitioners conceded both in the district court (A. 160–161, 163, 164) and the court of appeals (Appellant's Br. on Appeal, p. 25) that the determination by each Secretary relating to the Overton Park project could not be overturned unless it was arbitrary and capricious (5 U.S.C. 706(2)(A)).[40] However, before this Court they

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discovery in this case revealed none of the apparent discrepancies which allegedly came to light during *amicus*' pre-trial discovery in a wholly separate case. Introduction of the administrative record will demonstrate conclusively that the attempt by *amicus* to make such an argument has no place in the present litigation.

[39] In our view, this Court could properly decline to decide this issue in the abstract. It is entirely likely that on remand the district court will determine from an examination of the administrative record that the Secretary acted properly under any test that might be applied. If not, application can be made to bring this issue again to the Court, after it has been fully considered by the lower courts and decided on the basis of a complete record.

[40] Similarly, petitioner initially did not challenge the lower courts' use of this reviewing standard on their application for stay filed with this Court, raising the issue for the first time in their brief supporting the stay application, at pp. 28–29. This, in

argue, presumably based on a footnote in the dissent below (A. 189–190 n. 1), that the administrative decisions can be upheld only if supported by "substantial evidence" as required by 5 U.S.C. 706(2)(E).

That the "substantial evidence" standard has no application to the instant proceedings is clear from the face of the Administrative Procedure Act. It is, by the express terms of the statute, to be used only in cases where the court is reviewing action by an agency taken pursuant to the rule-making provisions of the Act (5 U.S.C. 553), or agency action based on an adjudicatory hearing as required in Section 556 and 557 of the Act (5 U.S.C. 554), or an agency determination subject to review "on the record of an agency hearing provided by statute" (5 U.S.C. 706(2)(E)). The instant case comes within none of the enumerated categories.

As we earlier indicated (*supra,* pp. 24–25), the Secretary of Transportation's determinations under Section 4(f) and Section 138 are subject to neither the rule-making provisions, nor the "adjudication" provisions of the Administrative Procedure Act. Even petitioners recognize (Pet. Br. 25) that "[i]n the present case * * * the Secretary of Transportation was not acting in a quasi-judicial capacity."

Similarly, the Secretary's action is not reviewable "on the record of an agency hearing required by statute." There is no provision in the Department of Transportation Act or in the Federal-Aid Highway

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itself, may be sufficient ground for this Court to decline to consider the question. *Safeway Stores, Inc.* v. *Oklahoma Grocers Ass'n,* 360 U.S. 334, 342 n. 7.

Act calling for such a hearing. Indeed, as already noted (*supra,* p. 25), the only hearing required in these circumstances is a public hearing by state officials (23 U.S.C. 128), which is by nature non-adjudicatory and quasi-legislative, designed to inform the community of the highway project under consideration and to elicit the personal views, opinions and observations of individuals in that community concerning the project. Even if this could be construed as a hearing conducted by the "agency" within the literal language of 5 U.S.C. 706(2)(E), and we submit that it cannot (cf. *American Airlines, Inc.* v. *Civil Aeronautics Board,* 359 F. 2d 624 (C.A.D.C.); *Charlton* v. *United States,* 412 F. 2d 390, 395 (C.A. 3) (concurring opinion); *Borden Company* v. *Freeman, et al.,* 256 F. Supp. 592, 600–602 (D.N.J.)), the legislative history of the Act reflects that this is not the type of "hearing" Congress had in mind when it enacted the Administrative Procedure Act; the "substantial evidence" rule was intended to apply exclusively to trial-type hearings of an adjudicatory, quasi-judicial nature. H. Rep. No. 1980, 79th Cong., 2d Sess., reprinted in Senate Judiciary Committee, *Legislative History of the Administrative Procedure Act,* at p. 279; and see *Gart* v. *Cole,* 263 F. 2d 244, 251 (C.A. 2).

At all events, the argument must fail for yet another reason. Irrespective of how the state public hearing may be characterized, judicial review of the Secretary's approval is not limited to the record of that hearing. It is, instead, required by statute to rest on "the whole record" that served as a basis for the administrative action taken (5 U.S.C. 706), of which the transcripts of the state public hearing comprise but a

small part. See, *e.g., Road Review League, Town of Bedford* v. *Boyd, supra.* "Section 706 is mandatory by its terms and not merely declarative of 'guidelines' with respect to the scope of judicial review of a federal agency's action." *Charlton* v. *United States,* 412 F. 2d 390, 392 (C.A. 3).

Accordingly, the proper reviewing standard is the one applied by both courts below and consistently followed by other courts in litigation of this type. See, *e.g., Udall* v. *Washington, Virginia and Maryland Coach Co.,* 398 F. 2d 765 (C.A.D.C.); *Nashville I–40 Steering Committee* v. *Ellington,* 387 F. 2d 179, 185 (C.A. 6); *Western Addition Community Organization* v. *Weaver,* 294 F. Supp. 433, 437 (N.D. Calif.), on remand, *Western Addition Community Organization* v. *Romney,* N.D. Calif., No. 490533, decided March 5, 1969; *Road Review League, Town of Bedford* v. *Boyd,* 270 F. Supp. 650, 659–660 (S.D.N.Y.); *D.C. Federation of Civic Associations* v. *Volpe,* 316 F. Supp. 754 (D.D.C.). The judicial task is to ascertain only whether the decision to route Interstate I–40 through Overton Park as a depressed highway was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. (Supp. V) 706(2)(A)).[41]

[41] Petitioners also contend that an alternative reviewing standard that could be followed in this case is the one set forth in 5 U.S.C. (Supp. V) 706(2)(F), which provides that the reviewing court may hold unlawful agency action that is "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." Here, however, as we have already pointed out (*supra,* 34), the determinations Congress explicitly required the Secretary of Transportation to make are not entitled to a *de novo* hearing. It is not for the courts to substitute their judgment for that of the Secretary in this area. See *Berman* v. *Parker,* 348 U.S. 26, 35.

## CONCLUSION

For the reasons stated, this Court should affirm the judgments below and decline to consider those issues which were not raised by petitioners' pleadings. In the alternative, it should vacate the judgment of the court of appeals and remand the case to the district court with instructions to vacate its judgment granting respondents' motion for summary judgment in order to enable the Secretary of Transportation to introduce the entire administrative record on which his decisions were based.

Respectfully submitted.

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